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No. 86-1311

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

**A. L. LABORATORIES, INC., and A/S APOTHEKERNES
LABORATORIUM FOR SPECIALPRAEPARATER,**
Petitioners,

vs.

NORTH AMERICAN PHILIPS CORPORATION,
Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court will review an issue Petitioners failed to raise in a timely fashion in the Court of Appeals?
2. Whether the Court of Appeals was correct in affirming the District Court's decisions that Petitioners failed to present sufficient evidence under Missouri law to impose either direct or vicarious liability upon Respondent?

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**RESPONDENT'S BRIEF IN OPPOSITION
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Respondent North American Philips Corporation ("North American") respectfully submits this brief in Opposition to the Petition for a Writ of Certiorari filed by Petitioners A. L. Laboratories, Inc., et al. ("AL Labs").¹

Petitioners seek review of the decision of the United States Court of Appeals for the Eighth Circuit which affirmed the judgments and rulings of United States District Judge Howard F. Sachs.

1. Respondent, North American Philips Corporation, is 58% owned by N. V. Philips' Gloeilampenfabrieken and has numerous wholly-owned subsidiaries located throughout the world.

STATEMENT OF THE CASE

This is a diversity action in which Petitioners, plaintiffs below, claimed damages for the misappropriation of proprietary data. The relevant facts were well stated by the Court of Appeals (Petition at 1a) and by the District Court in its Memorandum and Order of July 23, 1985 (Petition at 17a), and are summarized as follows.

This dispute arose out of the development and submission of scientific support data needed to gain U.S. Food and Drug Administration (FDA) approval to market a new animal drug. Such data do not become "general knowledge" after development and submission to the FDA, but are placed in a file bearing the name of the party who "owns" such data. Each subsequent applicant for drug approval who wishes to rely on data already submitted to the FDA must obtain permission from the "owner," usually by paying a fee to the owner.

In November 1973 AL Labs entered into a marketing agreement with Thompson-Hayward Chemical Co. ("Thompson-Hayward"), a wholly owned subsidiary of North American. North American was not a party to that agreement, but had introduced the AL Labs opportunity to Thompson-Hayward, which was free to accept or reject it. Under the agreement, Thompson-Hayward was to receive exclusive U.S. distribution rights for AL Labs' animal drug, zinc bacitracin, in exchange for Thompson-Hayward's best efforts in helping AL Labs obtain FDA approval for the drug. North American was not involved in the negotiation, drafting, or approval of the terms of the agreement.

The scientific data necessary for FDA approval was subsequently developed through a joint study coordinated

by an industry trade association, the Animal Health Institute (AHI). Results of the study were to be available only to sponsors who paid a share of the research costs. The sponsors were free to share the data with non-sponsors, however, without notice to or approval from the other sponsors. Thompson-Hayward paid the fee billed by AHI and was then reimbursed by AL Labs.

Philips Roxane, Inc. ("Philips Roxane"), which at this time was also a subsidiary of North American, had been originally listed as a participant in the study. When the data was developed and filed with the FDA, the FDA placed the data in a "master" file in Philips Roxane's name.

Therefore, when Thompson-Hayward applied for drug approval to the FDA on behalf of AL Labs, it had to obtain from Philips Roxane a right to refer to that data. There was no evidence that North American knew of the FDA "master" file in Philips Roxane's name or that a copy of the data had been placed therein.

In April 1976 AL Lab's zinc bacitracin was approved by the FDA. Five months later, AL Labs and Thompson-Hayward terminated their agreement. The termination agreement provided that Thompson-Hayward would "take such steps as are necessary to transfer or assign to AL . . . any other FDA submissions made by or on behalf of TH relating to AL's Zinc Bacitracin."

Philips Roxane's master file with the FDA and the copy of any data therein were not dealt with by the termination agreement. No North American representative who had any involvement in those negotiations even knew about the master file.

In October 1979 North American attorney Kim LeFever was asked by Philips Roxane's vice president Sam

Musser whether the termination agreement conveyed Philips Roxane's ownership interests to AL Labs. (Philips Roxane was not a party to that termination agreement.) LeFever responded negatively, having been told by Thompson-Hayward that it had transferred its right of reference to the data, the only thing Thompson-Hayward had the right to convey. There was no evidence that any North American personnel attended any meetings in 1979 where the ownership of the data was discussed. Philips Roxane's internal memoranda on this subject were not seen by North American.

Petitioners alleged that in 1981 Philips Roxane wrongfully referred to the AHI data in seeking FDA approval for the zinc bacitracin of a Yugoslavian drug company known as "KRKA." The only contact North American had with this transaction was passing the opportunity on to Philips Roxane, like it had done with the AL Labs/Thompson-Hayward matter. The evidence showed that North American's subsidiaries were independent entities, free to make their own day-to-day business decisions. North American's approval of such contracts was not required.

North American was consulted when Philips Roxane decided to submit the application to the FDA for approval on behalf of the Yugoslavian company. However, there was no evidence that North American's involvement related in any way to the AHI data aspect of the application.

The District Court ruled that the claim of North American's direct liability would not be submitted to the jury due to the insufficiency of Petitioners' evidence. Subsequently, the District Judge found an insufficient relationship between North American and Philips Roxane to justify the imposition of punitive damages against North Amer-

ican and granted North American judgment notwithstanding the verdict. The Court of Appeals, addressing only the punitive damages issue (because the direct liability theory was not raised by Petitioners in their initial brief), properly deferred to the District Court's determinations of the evidence under the requirements of Missouri law.

The decisions by the District Court and the Court of Appeals for the Eighth Circuit were solidly based upon the evidence and the applicable Missouri law. Petitioners now ask this Court to review the evidence and overturn two lower court decisions. That is not the role of this Court and the Petition should be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Petitioners Failed to Raise and Preserve in a Timely Fashion Their Seventh Amendment Argument in the Court of Appeals, Thereby Precluding Review by This Court.

Petitioners argue that they were deprived of their Seventh Amendment right to a jury trial because the District Court refused to submit to the jury Petitioners' claims of North American's direct liability and that the Court of Appeals for the Eighth Circuit erred in failing to address this issue. Petitioners failed to preserve this issue for consideration by this Court.

As admitted by Petitioners, the first mention of any claim for deprivation of their Seventh Amendment rights was in their petition for rehearing in the Court of Appeals. Petition at 11-12. Neither the Seventh Amendment issue nor the District Court's ruling that Petitioners failed to make a submissible case on the direct liability theory

were raised in the Court of Appeals at any time prior thereto.

This Court has a longstanding policy that it will not consider issues which were not presented to a court of appeals and not properly presented to this Court. *Cort v. Ash*, 422 U.S. 66, 72 n.6 (1975); *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967). When, as in this case, a contention is raised for the first time in a petition for rehearing at the Court of Appeals, it has not been raised in a timely manner for review by this Court. *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984) (where the respondent made a new argument for the first time in his response to the petitioner's motion for rehearing in the court of appeals, he failed to raise the issue in a timely manner and therefore precluded the Court's consideration of that issue).

There was no error in the Court of Appeals' failure to address the Seventh Amendment issue because it was not timely raised by Petitioners. Indeed, North American was not permitted to respond to the contentions raised in the petition for rehearing, absent a request by the Court of Appeals. Fed. R. App. P. 40. This asserted basis of reversal is obviously an afterthought and can be seen as an indication of its merits.

Petitioners' failure to raise any Seventh Amendment issue in a timely fashion precludes review by this Court and the petition for writ of certiorari should be denied.

II. This Case Involves Only a Review of Evidence and Specific Facts and Does Not Merit Review by This Court.

Petitioners ask the Court to review the manner in which the lower courts in this case applied specific facts

and evidence to Missouri law. This Court has a longstanding tradition that “[w]e do not grant a certiorari to review evidence and discuss specific facts.” *United States v. Johnston*, 268 U.S. 220, 227 (1925) (Holmes, J.); *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 537 (1957) (Frankfurter, J., dissenting; “[t]he rule that the Court does not grant certiorari to review evidence is a wise rule, indeed indispensable to the work of the Court”).

The function of a writ of certiorari is:

to secure uniformity of decision between [the circuit courts of appeals]; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.

Magnum Import Co. v. Coty, 262 U.S. 159, 163 (1923); quoted with approval in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. at 530 (Frankfurter, J., dissenting).

This Court has often stated that it will not offer what is in essence, a review of a question of state law. In *Bishop v. Wood*, 426 U.S. 341, 346 n.10 (1976), the Court stated that “[i]n dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable.” (quoting from *Township of Hillsboro v. Cromwell*, 326 U.S. 620, 629-30 (1945)). Accord, *Cort v. Ash*, 422 U.S. at 72 n.6.

Petitioners’ aim is to have this Court reverse the lower courts’ determination of the facts and evidence under Mis-

souri law. This case has no wider application than to address specific factual allegations involving private parties.

Petitioners' complaint is only that the conclusion reached by the District Court was incorrect in light of the record. There is no complaint that the Court applied the wrong Missouri law. There is no reason for this Court to review the particular factual record below. The decisions of the courts below were manifestly reasonable, and the petition should be denied.

III. This Case Presents No Substantial Question of Federal or Constitutional Law Meriting Review by This Court.

Petitioners argue that the District Court's failure to submit direct liability to the jury deprived them of the guarantees of the Seventh Amendment. Yet, a superficial review of this case reveals that this purported constitutional argument is a subterfuge for Petitioners' disagreement with the District Court's ruling on the sufficiency of the evidence and a futile attempt to satisfy the requirements of Supreme Court Rule 17. Petitioners cannot bootstrap themselves into this Court by arguing that the District Court violated the Seventh Amendment through a simple question of the sufficiency of evidence under Missouri state law.

In reality, Petitioners assert the specious argument that a district court may never grant a directed verdict without contravening the Seventh Amendment. "If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century." *Galloway v. United*

States, 319 U.S. 372, 389 (1942). See also *Neely v. Martin K. Eby Construction Co.*, 386 U.S. at 321 (Federal Rule of Civil Procedure 50(b), permitting a court to grant judgment notwithstanding the verdict, does not violate the Seventh Amendment's guarantee of a jury trial).

Petitioners next argue that this Court's opinions on the standard for a trial court's determination on a motion for summary judgment or motion for directed verdict create confusion and undermine the role of the jury. Petitioners argue that certiorari should be granted for the Court to clarify limits applicable to such determinations. Yet, Petitioners rely on these same cases in arguing that the District Court erred in granting North American a directed verdict.

The District Court properly employed the standards for a directed verdict in this case. After considering "the actual quantum and quality of proof necessary to support liability" under Petitioners' theories, the District Court correctly found that the evidence presented was insufficient to submit to the jury the direct liability claim against North American. *Anderson v. Liberty Lobby, Inc.*, 477 U.S., 106 S. Ct. 2505, 2513 (1966). See pp. 3-5, *supra*.

The District Court's ruling in this regard was not in conflict with the Seventh Amendment or the decisions of this Court. There is no reason to grant this writ of certiorari.

IV. The Decisions Below Were Correct in Light of the Evidence and Applicable Law.

The Court of Appeals correctly affirmed the District Court's ruling that the punitive damages award against North American should be set aside based upon the re-

quirements of Missouri law. The District Court was also correct in ruling that Petitioners failed to make a submissible case under Missouri law against North American on Petitioners' direct liability theory.

The District Court properly concluded that under the facts presented there was insufficient evidence to justify holding North American responsible for Philips Roxane's use of the data or to pierce the corporate veil between the two entities. Under Missouri law, corporate forms can be disregarded only when a two-prong test has been met: "Not only must the corporation be controlled and influenced by one or a few persons, in addition, the evidence must establish that the corporate cloak was used as a subterfuge to defeat public confidence, to justify wrong or to perpetrate a fraud." *Fairbanks v. Chambers*, 665 S.W.2d 33, 37 (Mo. App. 1984). The Court of Appeals correctly held that full ownership, with attendant dominance and control, is not sufficient to justify piercing the corporate veil. Petition at 14a. See also *Community Title Co. v. Roosevelt Federal Savings & Loan Assoc.*, 670 S.W.2d 895, 905 n.8 (Mo. App. 1984); *Liberty Financial Management Corp. v. Beneficial Data Processing Corp.*, 670 S.W.2d 40, 52 (Mo. App. 1984); *Smith v. City of Lee's Summit*, 450 S.W.2d 485, 489 (Mo. App. 1970).

The District Court held that under Missouri law North American would only be liable for directly making or influencing Philips Roxane's decision to use the data in question. The District Court and Court of Appeals were correct in noting that the record was devoid of any such evidence. Petition at 14a, 26a-28a.

Regarding the direct liability theory, Petitioners apparently allege some sort of civil conspiracy between North American and Philips Roxane. See Petition at 7 n.10,

citing to *Mills v. Murray*, 472 S.W.2d 6 (Mo. App. 1971), discussing civil conspiracy. Under Missouri law a civil conspiracy must be proven by clear and convincing evidence. *Mills v. Murray*, 472 S.W.2d at 13. In a diversity case such as this one, the burden of proof is regarded as a matter of substance and was, therefore, governed by the laws and the decisions of the state. *Aetna Casualty & Surety Co. v. General Electric Co.*, 581 F. Supp. 889, 895 (E.D. Mo. 1984), *aff'd*, 758 F.2d 319 (8th Cir. 1985). Under the applicable burden of proof, Petitioners failed to make a submissible case on direct liability for North American.

The evidence showed that North American gave assistance to Philips Roxane, but did not generally dominate or direct it. Clearly, North American did not dominate Philips Roxane with regard to the AL Labs project. In fact, LeFever was the only person at North American who learned of the existence of the data while Philips Roxane was still a subsidiary. His only contact was in 1979, years after the data was developed and only through a telephone conversation to answer a question, not to order or direct any action. The District Court properly directed a verdict on the direct liability theory.

Further, there was no evidence of any wrongdoing on the part of any North American personnel. North American's only contact with Philips Roxane between 1973 and 1981 regarding the data was limited to one short telephone conversation. During that conversation, LeFever merely relayed facts from one subsidiary to another on whether Philips Roxane's master file has been conveyed to AL Labs. Missouri law provides that punitive damages may not be awarded unless there is substantial evidence that the defendant knew its act was wrongful when it was performed. *Moon v. Tower Grove Bank & Trust Co.*, 691

S.W.2d 399, 401 (Mo. App. 1985). If LeFever's answer was mistaken, there is no evidence that he or anyone at North American knew it was wrong.

The District Court did not substitute its own evaluation of the evidence for the jury, but recognized its error in submitting the punitive damages issue to the jury. Such error was properly corrected by judgment notwithstanding the verdict.

The decisions of the Court of Appeals and District Court were fully consistent with the governing Missouri law and there is no basis for reversal on these grounds. The request for writ of certiorari should be refused.

CONCLUSION

Petitioners' request for certiorari raises issues that were not preserved for review in a timely fashion, presents no federal or constitutional questions, asserts no conflict between the circuits, presents no ruling in conflict with applicable decisions of this Court, and alleges no conflict between a federal court and state court on an important question of state law. Petitioners seek to burden this Court's already heavy docket with a case involving purely private interests and decided under a specific factual setting. The decisions of the Court of Appeals and District Court were correct and justice has been done. There is no basis for granting a writ of certiorari in this case, and Petitioners' request should be denied.

Respectfully submitted,

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